IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
WRIT PETITION NO. 479 (MS) OF 2006

Ram Nath, S/o Shri Budh Ram,
R/o C/o Jindal Road Line,
G.T. Road (Nearby Railway Crossing),
Mandi Dabwali, District Sirsa, Haryana. .....Petitioner.

Versus

1. Sardal Pal Singh,
   S/o Shri Sher Singh,
   R/o K-6, Rajori Garden, New Delhi.
2. Shri Subhash Kamboj,
   S/o Shri Sohan Lal Kamboj,
   R/o 4829/24, Ansar Road, Daryaganj,
   New Delhi. .....Respondents.

Mr. Siddharth Sah, Advocate for the petitioner.

Dated: 03.05.2006

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 10th April, 2006 passed by the Court of Civil Judge (Senior Division), Mussoorie Camp Court, (Distt. Dehradun) in Original Suit No. 832/1998 Sardal Pal Singh & others Vs. Ram Nath and others (Annexure No. 6 to the writ petition).

Briefly stated, a suit was instituted in the year, 1988 by the respondents against the petitioner praying for a decree against the defendant no. 4 to hand over the possession of the premises and in the alternative, in case the plaintiffs are not

able to get the decree against the defendant no. 4 for possession against the said property then a decree for Rs. 2,82,867/- be passed. Petitioner has submitted that the plaintiff thereafter amended the relief and only the alternative prayer has been claimed. On 19.11.2005 on the writ petition filed by one Sri Vinod Kumar defendant no. 3, the defendants were permitted to lead their evidence. The petitioner has filed an application under Order 26 Rule 4 along with the affidavit and also a medical certificate and has prayed for appointment of the Commissioner for the purpose of cross-examination. The said application was rejected by the Civil Judge (Senior Division) on the ground that there is no averment in the application and affidavit that he is unable to come to Dehradun. The ground given by the Civil Judge, therefore, that since the suit has been filed for the recovery of the amount demeaner of the witness being necessary and therefore, the provisions of Order 26 Rule 4 cannot be invoked. Order XXVI Rule 4 provides as under :-

"4. Persons for whose examination commission may issue.-(1) Any Court may in any suit issue a commission [for the examination on interrogatories or otherwise of--]

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) [any person in the service of the Government] who cannot, in the opinion of the Court, attend without detriment to the public service :

[Provided that where, under rule 19 of Order XVI, a person, cannot be ordered to attend a Court in person, a commission shall be issued for his examination, if his evidence is considered necessary in the interest of justice :

Provided further that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.]"

Learned Counsel for the petitioner has submitted that he has filed the application under Order 26 Rule 4 for cross-examination of the witness on commission, who is residing beyond the local limits. The said provision applies in the case of Order 26 Rule 19 C.P.C. and the proviso further requires the satisfaction of the Court. Order 26 Rule 19 C.P.C. provides as under:-

"19. Cases in which High Court may issue commission to examine witness.-(1) If a High Court is satisfied-

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

It may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub rule (1) --

(a) By a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central Government, or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Central Government, or

(c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding."

In view of the aforesaid, the Civil Judge having recorded the finding that neither there is any evidence in support of the application of the petitioner that he is unable to come to Dehradun nor the Civil Judge was satisfied that the witness can be examined on commission as according to the opinion of the Civil Judge demeanour of the witness being necessary further the presiding officer having recorded the reasons, I find no merit in the writ petition so as to interference under Article 227 of the Constitution of India.

Suit is very old, the trial Judge is directed to decide the suit expeditiously. However, the petitioner may approach the court below if the circumstances so arise at any point of time provided the petitioner satisfies the court with regard to the provisions contained under Order 26 of the Code of Civil Procedure.

The writ petition, therefore, lacks merit and is dismissed. No order as to costs.

(Rajesh Tandon, J.)

03.05.2006
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